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OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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BRUCE CEDELL, a single man,

Plaintiff/Petitioner,

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION
FOR JUSTICE FOUNDATION
AMICUS CURIAE MEMORANDUM IN SUPPORT OF REVIEW

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On Behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of insureds pursuing actions against their insurers for the tort of insurance bad faith.

II. BACKGROUND

The petition for review in this case provides the opportunity for the Court to decide when an insured suing his or her insurer for the tort of insurance bad faith may obtain access to the insurer's claim file under the so-called "civil fraud" exception to the attorney-client and work product privileges. This interlocutory review arises out of an action by Bruce Cedell (Cedell) against Farmers Insurance Company of Washington (Farmers) for insurance bad faith, breach of contract, and violation of the Consumer Protection Act, Ch. 19.86 RCW (CPA). The gravamen of Cedell's claims is that Farmers, as his first-party insurer, mishandled a casualty loss claim based on a fire at Cedell's residence. The underlying

facts are drawn from the Court of Appeals' opinion, the briefing of the parties, and two orders and a letter opinion of the superior court. See Cedell v. Farmers Ins. Co., 157 Wn.App. 267, 237 P.3d 309 (2010), *review pending*; Cedell Pet. for Rev. at 3-9; Farmers' Ans. to Pet. for Rev. at 1-5; Cedell Br. at 1-12; Farmers Br. at 3-14; CP 490-96 (3/2/09 Findings & Order); CP 497 (3/2/09 Order Re: In Camera Review of Claim File); CP 485-89 (2/26/09 letter opinion).

Division II of the Court of Appeals granted discretionary review of two superior court orders involving discovery disputes between the parties. See CP 490-96 & 497. Initially the superior court ordered an in camera review of Farmers' claim file to determine whether the company properly invoked the attorney-client and work product privileges. See CP 490-96. In ordering in camera review, the court concluded that the facts "are adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception set forth in Escalante to the attorney-client privilege has occurred." CP 494.¹

After conducting the in camera review, the court ordered Farmers to produce its entire claim file to Cedell, without redaction. See CP 497. The court explained the basis for its order in a letter opinion dated February 26, 2009. See CP 485-89.² The court discussed both the attorney-

¹ The superior court reference is to Escalante v. Sentry Ins., 49 Wn.App. 375, 743 P.2d 832 (1987), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *review denied*, 109 Wn.2d 1025 (1988).

² The superior court intended for this letter to be attached to and part of its order regarding in camera review, although apparently the letter was not attached to the order as directed. See CP 497.

client and work product privileges, and concluded that neither applied under the circumstances to prevent discovery of the claim file. See CP 485-89. In the course of its analysis, the court noted that Farmers' legal counsel was actively involved in the claims-handling process, "with primary responsibility for communicating with the insured for several months before the insured retained counsel." See CP 488. Farmers sought and obtained discretionary review of both of these orders, and proceedings were stayed pending review.

Division II reversed in a published decision, holding that the superior court abused its discretion in conducting in camera review and in applying the civil fraud exception to the privileges asserted by Farmers. The court rejects Cedell's argument that the attorney-client privilege does not apply in a first-party insurance bad faith claim context. In so ruling, the court cautions that:

an insurance company may not hire an attorney as a claims adjuster just to fall within the attorney[-]client privilege. A claims adjuster's conduct is not privileged simply because the claims adjuster happens to be a lawyer. Accordingly, only information, investigation, and advice [lawyer] Hall gave Farmers *in his capacity as an attorney* is subject to the privilege.

157 Wn.App. at 275-76 (emphasis added). The court does not otherwise address the role that Farmers' lawyer fulfilled in the claims-handling process, nor its bearing on the privilege analysis.

Next, the court turns to whether the superior court properly applied the civil fraud exception in this case, under its reading of the two-step analysis established in Escalante. Under the first step of the analysis,

considering whether Cedell made a sufficient "factual showing" to obtain in camera review, the court holds that a factual showing of insurance bad faith is insufficient. Instead, the court limits the exception to the nine elements of actual fraud. See Cedell at 277-78 (quoting nine-element test of actual fraud, and stating "[w]hile the trial court found a factual showing of bad faith, it did not find a factual showing of fraud").

Under the second step of the Escalante analysis, Cedell holds that when the factual showing of fraud is sufficient, the superior court may exercise discretion to conduct an in camera inspection to determine whether there is a "foundation in fact" to overcome the privilege. See Cedell at 277. However, Division II does not explain its understanding of the difference, if any, between the initial factual showing necessary to obtain in camera review, and the foundation in fact necessary to obtain disclosure of the ostensibly privileged materials. See id. at 277, 279.

In applying its reading of Escalante, the court determines that Cedell did not satisfy either prong of the two-part test, concluding that the facts "are not adequate to support a finding of fraud" necessary for in camera review under the first prong, Cedell at 278, and that there is no "foundation in fact for a claim of civil fraud" necessary to obtain disclosure under the second prong, id. at 279.

III. ISSUES PRESENTED

The issues raised in the petition for review, re-framed here, are:

1. Does Division II's opinion conflict with Division I's opinion in Escalante, both with respect to the elements of the "civil fraud"

exception to the attorney-client and work product privileges, and the procedure for determining whether the exception applies? (See Cedell Pet. for Rev. at 1, 13-20.)

2. Does the "civil fraud" exception to the attorney-client and work product privileges apply per se to an insured's claim against their casualty insurer for bad faith, when the insurer's lawyer is directly involved in the claims-handling conduct that is the subject of the bad faith claim? (See Cedell Pet. for Rev. at 3, 10-15.)

IV. ARGUMENT IN SUPPORT OF REVIEW

A. Review is warranted under RAP 13.4(b)(2) because the decision of Division II conflicts with Division I's decision in Escalante.

Under RAP 13.4(b)(2), review is warranted when decisions of the Court of Appeals conflict with each other. In this case, Division II's opinion conflicts with Division I's opinion in Escalante, both as to the substantive formulation of the civil fraud exception to the attorney-client and work product privileges, and as to the procedure for determining whether the exception applies in a given case.³

Under Escalante, the civil fraud exception to the attorney-client privilege applies to insurance bad faith and related CPA claims against first-party insurers. See 49 Wn.App. at 393-94. A superior court first determines whether the party seeking discovery has made a factual showing "adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the ... fraud exception ... has occurred." Id. at 394 (quoting Caldwell v. District Court, 644 P.2d 26, 33

³ While the civil fraud exception usually arises in the context of the attorney-client privilege, it should apply equally to the work product privilege. See Caldwell v. District Court, 644 P.2d 26, 34 (Colo. 1982) (cited with approval in Escalante, 49 Wn.App. at

(Colo. 1982) (involving underlying action for fraud and civil conspiracy)). This threshold showing to justify in camera review does not require the court to find conclusively that wrongful conduct occurred, let alone that the conduct satisfied the nine elements of actual fraud, in recognition of "the proof problems inherent in requiring a prima facie showing at the discovery stage," Id. (adopting reasoning of Caldwell). The evidence need only be sufficient to create a legitimate question about whether invocation of the attorney-client or work product privileges serves to mask wrongful conduct involving the lawyer.

If this threshold requirement is met, the superior court has the discretion to conduct an in camera review to determine whether there is a "foundation in fact" for applying the civil fraud exception. Id. The foundation in fact is assessed after in camera inspection of the relevant materials. See id. As with the first step in the analysis, this second step does not require the court to find conclusive evidence of wrongful conduct. A lesser quantum of proof than a prima facie case is sufficient because, as with the first step, "[r]equiring a strict prima facie case may not be possible at the discovery stage, and would result in an overzealous protection of the attorney-client privilege in a context where the rationale for that privilege may be inapplicable." Caldwell at 33; accord Escalante at 394 (citing Caldwell).

394); see also Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 744, 174 P.3d 60 (2007) (noting work product may be discoverable in circumstances such as civil fraud).

While proof of the nine elements of actual fraud would be sufficient to satisfy the two-step analysis under Escalante, such proof is not necessary to satisfy either prong of the test. Until Division II's opinion below, no Washington court has read Escalante as requiring proof of actual fraud. On the contrary, Escalante specifically contemplates that tortious conduct such as insurance bad faith may satisfy the test. The court held that the superior court abused its discretion in denying discovery of ostensibly privileged materials without considering whether to conduct an in camera inspection, notwithstanding the absence of a claim of actual fraud. See Escalante at 393-94.

In reaching this result, Escalante cited with approval United Servs. Auto. Ass'n v. Werley, 526 P.2d 28 (Alaska 1974). Werley involved an underlying action for claims mishandling in an uninsured motorist context, and the court had little difficulty extending the civil fraud exception to insurance bad faith situations:

When an insurer *through its attorney* engages in a bad faith attempt to defeat, or at least reduce, the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate. We thus find that the tortious activity alleged by Werley satisfies the 'civil fraud' requirement of the exception to the attorney-client privilege.

526 P.2d at 33 (footnote omitted; emphasis added); see also id. at 32 & n.12. Such conduct is "tantamount to civil fraud." See Escalante at 394.

Division II has misread Escalante as limiting the civil fraud exception to actual fraud, and has imposed a much more onerous standard of proof in order for the superior court to subject disputed materials to in

camera review or thereafter require disclosure. The result is a conflict between opinions of the Court of Appeals, which can only serve to create confusion among insurers, insureds and their counsel, and foster inconsistent results among superior courts.⁴

B. Review Is Warranted Under RAP 13.4(b)(4) Because Proper Application Of The Attorney-Client And Work Product Privileges In Insurance Bad Faith Claims Involving The Conduct Of A Casualty Insurer's Lawyer Is A Matter Of Substantial Public Interest.

Under RAP 13.4(b)(4), review is warranted when a case presents issues of substantial public interest. In this case, the extent to which the attorney-client and work product privileges apply in insurance bad faith claims involving the conduct of a casualty insurer's lawyer, and the proper interpretation and application of exceptions to these privileges, are matters of substantial public interest. This is true whether the issue is framed in terms of the proof requirements for the civil fraud exception, or in terms of whether the exception should apply on a per se basis to the insurer's claim file in bad faith litigation questioning the conduct of the insurer's lawyer in the claims-handling process. See Cedell Pet. for Rev. at 15-20 (scope of exception); id. at 10-13 (per se rule).

Insurance is a matter of "public interest." RCW 48.01.030. Unlike traditional contracts, insurance policies "abound with public policy considerations." See Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372,

⁴ In addition to conflict with Escalante, Cedell also frames the issues in terms of conflict with Barry v. USAA, 98 Wn.App. 199, 989 P.2d 1172 (1999). See Cedell Pet. for Rev. at 3, 10-14. Among other things, Barry involves a fact-specific application of the Escalante

376, 535 P.2d 816 (1975). First-party insurers like Farmers have quasi-fiduciary obligations to their insureds, requiring the insurer give equal consideration to its insured in all matters. See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986).

The proper interpretation and application of exceptions to the attorney-client and work product privileges are matters of public interest as well. Because "the [attorney-client] privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists." Dike v. Dike, 75 Wn.2d 1, 11, 448 P.2d 490 (1968). Formulating and applying exceptions to privileges requires the Court to engage in "balancing society's interest in the free and open flow of communication between attorney and client, which the privilege promotes, against society's interest in the administration of justice by our courts on the basis of a full disclosure of the facts and with the affirmative assistance of attorneys, which the privilege discourages." Id., 75 Wn.2d at 14.

Despite the public interest in the issues presented by this case, they often are insulated from appellate review because they are resolved at the discovery stage of litigation, by means of non-dispositive orders. Interlocutory review is available in only limited circumstances. See

two-step process for applying the civil fraud exception. See Barry, 98 Wn.App. at 206-07.

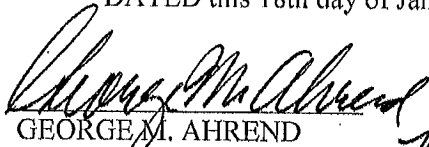
RAP 2.3(b) (stating grounds for interlocutory review); Maybury v. Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959) (stating policy against piecemeal appeals of interlocutory orders). Moreover, by the time final judgment is entered and an appeal as a matter of right is available, issues such as those presented here may be rendered moot by subsequent events at trial, or deemed to be eclipsed by other outcome-determinative issues.

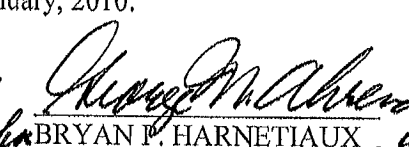
As a result, this case presents a unique opportunity for the Court to address the extent to which the attorney-client and work product privileges apply to insurance bad faith claims involving the conduct of the insurer's lawyer, and to clarify the proper interpretation and application of the civil fraud exception to these privileges. The Court should address these issues for the benefit of insurers and insureds, and the bench and bar.

V. CONCLUSION

The petition for review should be granted.

DATED this 18th day of January, 2010.


GEORGE M. AHREND

 *for* BRYAN P. HARNETIAUX, *with authority*

On Behalf of WSAJ Foundation

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Subject: Cedell v. Farmers (S.C. #85366-5)

Dear Mr. Carpenter:

On behalf of the Washington State Association for Justice Foundation, a letter application to file an amicus curiae memorandum in the above referenced case, and a proposed amicus curiae memorandum are attached to this email. Counsel for the parties have agreed to accept service of these documents by copy of this email. Thank you.

Sincerely,

--

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